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LOCAL GOVERNMENT

Court Puts Redevelopment on Ice

Pitfalls encountered by a municipality

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In keeping with the recent trend of greater judicial scrutiny of local redevelopment designations, a court recently rejected a redevelopment designation by the Borough of Neptune City. The unique circumstances of this case illustrate the many pitfalls that may be encountered by a municipality seeking to invoke the redevelopment process of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. ("LRHL"), and raise unique issues that should serve as guideposts for municipalities and property owners.

Central to Neptune City's redevelopment objectives was a 1.7-acre property located in the Borough's light industrial zone, an abandoned industrial facility known as the "Icehouse." The property had been vacant for a period of at least 10 years, taxes were delinquent, and the property suffered from adverse environmental conditions. In an effort to facilitate the redevelopment of the Icehouse, the Borough Council directed its Land Use Board to evaluate a larger

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area measuring approximately 17 acres to determine whether the area qualified for redevelopment pursuant to the LRHL. At the initial meeting of the Land Use Board, members of the Land Use Board commented that the Borough needed to designate this larger area for redevelopment for the purpose of "enticing" a redeveloper to redevelop the Icehouse property.

The study area consisted largely of light industrial uses, though it included some modest single-family homes, a motel, and an apartment building. The study area fell within the Borough's light industrial zone. The Borough's master plan recommended that the area continue as an industrial area to permit a variety of industrial uses. The master plan also referred to this industrial area as "an important part of the Land Use of the Borough of Neptune City."

Among the industrial uses in the study area was a 2.7-acre parcel owned and operated by Park Steel & Iron Company as a steel fabrication plant. In its redevelopment study, the Borough's planning consultants found that the Park Steel fabrication building, which is of corrugated metal construction, exhibited areas of rust and soot. The study report also concluded that the design of the building was

obsolete due to its use of corrugated metal sheets for siding and roofing. Testimony from the principal of Park Steel demonstrated that this method of construction is typical for steel fabrication facilities. Nonetheless, the Borough planners found the Park Steel facility to qualify for redevelopment due to perceived obsolescence.

Several property owners challenged the finding of need for redevelopment, primarily the light industrial users in the study area. A number of the parties challenging the redevelopment ultimately settled with the municipality in a way that would have allowed them to retain their industrial uses within the study area and some were allowed to make additional improvements. Other property owners, including Park Steel, continued to challenge the designation.

The court threw out the redevelopment designation for a number of reasons. First, the court noted that the Borough's master plan considered this industrial area to be an important part of the Borough's Land Use, and contemplated the continued use of the area for industrial purposes. Furthermore, the court noted that the Borough's planning consultants made very limited inquiries to the property owners or operators concerning the nature of the operations within the study area. In addition, they did not conduct interior building inspections. Importantly, the planning consultants did not study occupancy levels, employment within the study area, and

code violations or other routine development considerations.

With specific regard to the Park Steel property, the court likewise noted the absence of code violations of any kind. Furthermore, while the buildings on the property may not have been aesthetically pleasing, there was nothing to suggest that they were obsolete or structurally unsound. In fact, the court noted that the Borough's planning consultants failed to compare the Park Steel facility to other facilities of its type.

The Borough's planning consultants also characterized much of the study area as in need of redevelopment by virtue of criteria "d," "e" and "h" of the LRHL. The court found that the Borough had not established the application of criterion "d," since there was nothing to suggest that the factors cited by the Borough planners caused any threat to human health, safety or welfare. Likewise, the court found that application of criterion "e" of the LRHL was not proper, since there were no title or diversity of ownership issues. Citing *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, the court noted that while facilities such as the Park Steel facility may be a less than optimal use of property, that alone is not sufficient to qualify a property for redevelopment under criterion "e" or any other redevelopment criteria of the LRHL. The court also rejected the Borough's application of criterion "h" of the LRHL, which relates to smart growth planning. The court noted that the Borough's planning report made no conclusions as to how smart growth principles could be achieved in regard to the study area as a whole.

Following the decision of the court, the Borough filed a motion for reconsideration on the novel theory that the court could sustain the redevelopment designation with regard to the Icehouse property, since the Court had found the Icehouse property to be qualified for redevelopment under criterion "b," the Icehouse property having been vacant for 10 years. The court denied the Borough's motion for re-

consideration, noting that because the Borough council had designated the area as a whole for redevelopment and did not evaluate the Icehouse in isolation, and because the court had never been asked to evaluate the Icehouse property individually, the court could not reform the redevelopment designation as requested by the Borough.

This result demonstrates that courts will not reform redevelopment designations when the bulk of the area under consideration does not qualify for redevelopment under the LRHL. Prior decisions have invalidated redevelopment designations with respect to single properties, while allowing the designation to stand with respect to the balance of a study area. However, the *Park Steel* court would not go so far as to allow a single property to remain designated — even though the court acknowledged that property met the criteria of the LRHL — when the rest of the redevelopment area did not meet the criteria. The court properly noted that the blight conditions of a study area must predominate the area. This decision sends a clear message to municipalities to avoid being over-inclusive when considering the scope of an area to be considered and ultimately designated for redevelopment. Indeed, in this regard, the comments of the members of the Neptune City Land Use Board may have been fatal to the redevelopment designation to the extent they acknowledged that the Borough's true goal was to redevelop the Icehouse building but that the Borough needed a larger area to entice a redeveloper to redevelop that single parcel.

In addition to the fact that courts will not reform redevelopment designations to the extent requested by the Borough of Neptune City in this case, there are other lessons to be learned from this matter.

First, the court summarily rejected the Borough's reliance on criterion "h," a criterion added to the LRHL in 2003. That redevelopment criterion applies if "designation of the delineated area [for redevelopment] is consistent

with smart growth planning principles." This standard has come under substantial attack for its unconstitutional overbreadth and the resulting potential for abuse. Seemingly, any area in this state could qualify for redevelopment under this standard, particularly if it is located near a transit hub. Furthermore, this standard is contrary to the intent of the LRHL in that the LRHL requires municipalities to consider existing conditions in making a designation for redevelopment, while criterion "h" would seem to require a prospective analysis of future potential redevelopment of an area. A redevelopment designation that relies solely on this factor is likely to be defeated. In the *Park Steel* case, the Borough planners did not suggest how smart growth principles could be achieved through the redevelopment of the area. Indeed, the planners acknowledged the impossibility in knowing at the time of their study the extent to which smart growth principles could be achieved through redevelopment of the area, notwithstanding a purported intent on the part of the Borough to implement smart growth principles in redeveloping the area. Such an intent is not sufficient to carry the day for application of the smart growth redevelopment factor. While this case is not yet the death knell for criterion "h," it certainly demonstrates the difficulty in applying that criterion in the context of a redevelopment designation.

Moreover, the *Park Steel* case further refines the test for obsolescence under criterion "a" of the LRHL. *Spruce Manor Enterprises v. Borough of Bellmawr*, 315 N.J. Super. 286 (Law Div. 1998), is one of the few cases that provides guidance on the LRHL's use of obsolescence as a factor in designating a property for redevelopment. The *Spruce Manor* court held that "obsolescence is the process of falling into disuse and relates to the usefulness and public acceptance of a facility." As was the case in *Spruce Manor*, the Park Steel facility was operational and was not falling into a state of disuse. The *Park Steel* court noted that the Borough's planners did not compare the

Park Steel facility to others of its kind, suggesting that looking at similar facilities would illustrate whether the facility being considered is obsolete. The record before the Land Use Board demonstrated that other steel fabrication facilities utilized the same corrugated steel construction as the Park Steel facility. The existence of similar facilities illustrates the public acceptance of that common construction technique and disproves any notion of obsolescence.

The failure of the Borough planners to compare the Park Steel facility to like facilities rendered their conclusions net opinion and was fatal to their obsolescence conclusion.

In addition, the Borough's master plan and tolerance of continued industrial uses in this area undermined the conclusions of its planners that the industrial uses in the area were inconsistent with surrounding residential uses. In light of those facts, the court

could not find the existing industrial uses to be deleterious as suggested by the Borough.

While the *Park Steel* decision on its face may appear to be just one of many post-*Gallenthin* decisions reining in abuses of local redevelopment powers, it does present unique issues that give municipalities more guidance in considering an area for redevelopment and give property owners more fodder for challenging such designations. ■